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The First Amendment: Expressive Association or Invidious Discrimination?

Christopher W. Smart

CASE COMMENTS

THE FIRST AMENDMENT: EXPRESSIVE ASSOCIATION OR INVIDIOUS DISCRIMINATION?

Boy Scouts of America v. Dale, 120 S. Ct. 2446 (2000)

Christopher W. Smart[*] [**]

Petitioners, the Boy Scouts of America and the Monmouth Council, revoked the adult membership of Respondent, James Dale, upon learning of his avowed homosexuality and gay rights activism.[1] Respondent filed a complaint asserting that Petitioners had thereby violated New Jersey's public accommodations statute.[2] The Superior Court, Law Division, granted summary judgement for Petitioners, based on its finding that the Boy Scouts was not a place of public accommodation.[3] On appeal, the Superior Court, Appellate Division, affirmed in part and reversed in part.[4]

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* For my parents, Eugene and Cheri Smart. My thanks go to James Sullivan for reading an earlier draft of this comment.

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1. Boy Scouts of Am. v. Dale, 120 S. Ct. 2446, 2449 (2000). Respondent had been a highly decorated Scout for a decade prior to his becoming an assistant scoutmaster. *Id.* After going away to college, Respondent revealed his homosexuality in an interview that was subsequently published in a newspaper. *Id.* It was through this newspaper article that Petitioners learned of Respondent's homosexuality. *Id.*

2. *Id.* Respondent also argued that Petitioners had violated the common law. *Id.* The New Jersey statute reads in pertinent part:

> All persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, publicly assisted housing accommodation, and other real property without discrimination because of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, family status, or sex, subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right.

N.J. STAT. ANN. § 10:5-4 (West 1999).

3. Dale v. Boy Scouts of Am., 706 A.2d 270, 277 (N.J. Super. Ct. App. Div. 1998), *rev'd*, 734 A.2d 1196 (N.J. 1999), *rev'd*, 120 S. Ct. 2446 (2000). The Law Division held that the First Amendment prevented the government from forcing the Boy Scouts, a group engaged in expressive association, to accept an avowed homosexual as an adult leader in contradiction to its belief that homosexuality is morally wrong. *Id.*

4. *Id.* at 274. The New Jersey Superior Court's Appellate Division affirmed the dismissal of Respondent's common law claim but otherwise reversed, holding that the Boy Scouts is a place of public accommodation under the meaning of the New Jersey statute. *Id.* The appellate division

The New Jersey Supreme Court affirmed.[5] The United States Supreme Court granted certiorari,[6] and reversed the New Jersey Supreme Court decision, and HELD, that the First Amendment right of expressive association prohibits New Jersey from applying its public accommodations law to require Petitioners to retain Respondent as an assistant scoutmaster.[7]

The First Amendment explicitly provides for the freedom of speech and the freedom of assembly.[8] Beginning with *NAACP v. Alabama ex rel. Patterson*, however, the Supreme Court recognized the correlative right of association as fundamental to securing these enumerated First Amendment rights.[9] In *Patterson*, an Alabama court held the NAACP in contempt for not complying with a court order to produce a full membership list.[10] The NAACP argued that such an order violated its freedoms of speech and assembly.[11] The Court agreed.[12] Group association, the Court reasoned, both enhances the propagation of points of view and is inseparable from freedom of speech.[13] Any state action which might impinge upon this freedom to associate, the Court thus held, is subject to the strictest scrutiny.[14]

In *Roberts v. United States Jaycees*,[15] the Supreme Court fashioned a more forgiving standard for reviewing state anti-discrimination laws[16]

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also rejected Petitioners' claim that Respondent's public avowal of his homosexuality directly conflicted with their "morally straight" and "clean" policies. *Id.* at 293.

5. Dale v. Boy Scouts of Am., 734 A.2d 1196, 1230 (N.J. 1999), *rev'd*, 120 S. Ct. 2446 (2000). The New Jersey Supreme Court held that the Boy Scouts' First Amendment rights were not infringed, because the Boy Scouts is a place of public accommodation and thus subject to the public accommodations law which prohibits discrimination on the basis of sexual orientation. *Id.* The court also rejected the argument that Dale's mere presence was a symbolic expression of endorsement of homosexuality and, thus, that it was forced speech. *Id.* at 1229.

6. *Dale*, 120 S. Ct. at 2451. The Supreme Court granted certiorari based on the constitutional question. *Id.*

7. *Id.* at 2457.

8. U.S. CONST. amend. I. The First Amendment reads in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

9. 357 U.S. 449, 460 (1958).

10. *Id.* at 451.

11. *Id.*

12. *See id.* at 462.

13. *Id.* at 460.

14. *Id.* at 460-61.

15. 468 U.S. 609 (1984).

16. Since Reconstruction, when they were first codified, state anti-discrimination laws have enjoyed a long, productive history in the United States. *See generally* Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 515 U.S. 557, 571 (1995) (discussing Massachusetts' version of the law as the first attempt to codify the common law rule of public accommodations). Noting the importance of these state efforts to curtail invidious discrimination, the Court in *Romer* discussed the historical and legal context in which the state laws emerged. Romer v. Evans, 517 U.S. 620,

when such laws are applied to groups claiming the right of expressive association.[17] The appellants in *Roberts* brought suit against the United States Jaycees under the Minnesota Human Rights Act.[18] Exclusion of women from full membership in the Jaycees, the appellants alleged, was an unfair discriminatory practice as defined in the statute.[19] The appellee argued that forcing the Jaycees to accept women would violate its constitutional rights of free speech and association.[20]

The Court found that the freedom of association necessarily implied the freedom not to associate.[21] But the Court also fashioned an important limitation to this freedom.[22] The right of expressive association is not absolute.[23] A compelling state interest unrelated to the suppression of ideas may justify an infringement of expressive association, if there are no less restrictive means by which the state may achieve its ends.[24] One such compelling interest, explained the Court, is the commitment to eradicating invidious discrimination.[25]

The Court concluded that some forms of expressive activities, such as those producing harms distinct from their expressive content, do not enjoy

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627-28 (1996). Such laws, although developed prior to federal law, were subsequently used as stop-gap measures to fill the void between common law and federal statutes. *See id.* at 627. Common law rules prohibiting discrimination in places of public accommodation had proved too general, providing only that innkeepers and other public employment professionals are prohibited from refusing to serve a customer without good reason. *See id.* And, in the aftermath of *The Civil Rights Cases*, Congress did not have the general authority under the Fourteenth Amendment to prohibit discrimination in all places of public accommodation. *Id.* at 627-28 (citing The Civil Rights Cases, 109 U.S. 3 (1883)). While originally aimed at ending racial discrimination, these statutes have been substantially broadened to include such categories as color, religion, national origin, sex, family status, and sexual orientation. *Hurley*, 515 U.S. at 571-72.

17. *Roberts*, 468 U.S. at 623. The Court found that the freedom of association is composed of two other ancillary freedoms, intimacy and expression. *Id.* at 617-18. While both are elements of the freedom of association, they are applied to distinct types of groups. *See id.* The freedom of intimate association protects close human relationships such as those found amongst family members, while the freedom of expressive association protects association for the explicit purpose of participating in the activities enumerated in the First Amendment. *See id.* The effect of the Court's division is to limit protection under the freedom of association to either extremely intimate groups or ones engaged in expression. *See id.*

18. *Id.* at 614.

19. *Id.* at 614-15.

20. *Id.* at 615.

21. *Id.* at 623.

22. *See id.*

23. *Id.*

24. *Id.*

25. *See id.* at 628. The interest in eliminating invidious discrimination has generally been recognized as a compelling one. *See, e.g.*, Bd. of Dirs. of Rotary Int'l v. Rotary Club, 481 U.S. 537, 549 (1987) (upholding a requirement under the California Unruh Act that women be admitted to Rotary Clubs in that state).

constitutional protection.[26] Accordingly, the Court held that the admission of women as full members of the Jaycees neither impaired the group's ability to express its views nor forced it to alter its message of promoting the interests of young men.[27] This was the case, held the Court, even though the enforcement of the law may have effected some incidental abridgement of the Jaycees' right of expressive association.[28]

The Supreme Court again addressed a conflict between a state anti-discrimination law and the First Amendment in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*.[29] In *Hurley*, however, the Court did not uphold the application of the Massachusetts law.[30] A gay and lesbian group attempted, by invoking the law, to force parade organizers to admit them to a St. Patrick's Day parade.[31] The Court rejected this argument, holding that forcing the organizers to include a group conveying a message contrary to their own violated the organizers' First Amendment right to autonomy over their expression.[32]

The Court explained that its holding was the product of a peculiar operation of the law.[33] Parades, the Court determined, are a form of symbolic expression.[34] As a result, the state court's application of the law in this instance had the unusual effect of turning the organizers' speech itself into a public accommodation.[35] Under these circumstances, the

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26. *Roberts*, 468 U.S. at 628.

27. *Id.* at 627.

28. *Id.* at 628. The Court in *Rotary Club* similarly explained that, even if the Unruh Act worked some minimal infringement on the expressive association of the Rotary members, the infringement was nevertheless justified in light of the State's interest in eradicating discrimination. 481 U.S. at 549.

29. 515 U.S. 557, 559 (1995).

30. *Id.* at 566.

31. *Id.* at 561. The group, styling itself "GLIB," consisted of gay, lesbian, and bisexual Irish-Americans who wished to march in the St. Patrick's Day-Evacuation Day Parade specifically to express gay pride. *Id.* The organizers had no stated objection to the members of GLIB, or homosexuals generally, marching in the parade as individuals. *Id.* at 572. Rather, their only objection was to the inclusion of the pro-gay message. *Id.*

32. *Id.* at 566.

33. *Id.* at 572.

34. *Id.* at 568-69. The Court found parades to be a type of social drama that imbue the very act of walking in a group with meaning. *See id.* at 568. Finding symbolism to be a form of communication, the Court explained that the constitutionally-protected expression found in a parade thus extends past the written and spoken words of songs and banners to the act of marching itself. *See id.* at 569. *Compare* Texas v. Johnson, 491 U.S. 397, 399 (1989) (holding that flag-burning is imbued with sufficient elements of communication to enjoy First Amendment protection in the absence of a compelling state interest not related to the suppression of expression), *with* United States v. O'Brien, 391 U.S. 367, 376, 382 (1968) (holding that not just any form of conduct may be labeled speech, and therefore, that a substantial government interest may overcome the communicative aspect of burning a registration certificate).

35. *Hurley*, 515 U.S. at 573. The parade was thus not merely an exercise in association but

organizers' lack of a specific expression[36] was irrelevant because the organizers had a right to exclude any message from their own message, the parade.[37] The Court's decision was, thus, based squarely on a theory of free speech.[38] To distinguish its holding in *Roberts*, the Court explained that, in *Roberts*, the state had compelled access to the group's benefit, not its message.[39]

In the instant case, the Supreme Court acknowledged the rule set forth in *Roberts* regarding the limitation of expressive association when opposed by a state's compelling interest in abolishing invidious discrimination.[40] Ultimately, however, the instant Court applied the First Amendment analysis used in *Hurley* to Petitioners' claim of freedom of expressive association.[41]

The instant Court explained that to claim protection under expressive association a group must actually be engaged in some form of expression.[42] Petitioners' goal of instilling values in young people, the instant Court determined, constitutes such a form of expression.[43] Part of this message, Petitioners urged, is that homosexual conduct is contradictory to their moral code, as manifest in the terms "morally straight" and "clean."[44] The

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also an act of speech in and of itself. *See id.*

36. The parade organizers were lax in their determinations as to whom might be granted a permit to march, but the Court made an analogy between the parade and newspapers which, despite permissive standards, are more than simply passive receptacles. *Id.* at 575 (citing Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974)).

37. *See id.* at 573.

38. *See id.* Explaining that the general rule of free speech allows speakers to determine the content of their speech, the Court reasoned that a central tenet of free speech is the right to decide what not to say. *Id.* Contrast this doctrine with the more limited freedom not to associate. Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984) (discussing the freedom of association and its restriction with respect to compelling state interests).

39. *See Hurley*, 515 U.S. at 580. The implicit reasoning here is that, as far as the parade is concerned, the benefit is the message. *See id.*

40. Boy Scouts of Am. v. Dale, 120 S. Ct. 2446, 2451 (2000).

41. *Id.* at 2457. Despite the fact that the parade in *Hurley* was not explicitly deemed an expressive association, the instant Court announced that it would nevertheless adopt the *Hurley* analysis. *Id.*

42. *Id.* at 2451. Contrast expressive association to the right of intimate association which has no expressive requirement, but rather, is determined by the size and exclusivity of the group. *See Roberts*, 468 U.S. at 620.

43. *Dale*, 120 S. Ct. at 2452.

44. *See id.* The Scout Oath reads:

> On my honor I will do my best
> To do my duty to God and my country
> and to obey the Scout Law;
> To help other people at all times;
> To keep myself physically strong, mentally awake,

instant Court deferred to this assertion, holding that the Court need not inquire beyond it.[45] Similarly, in determining whether Petitioners' expressive association would be significantly affected by Respondent's inclusion, the instant Court again relied almost entirely on Petitioners' declaration that it would.[46]

Despite this deference, the instant Court explained that the freedom of expressive association is not a shield against anti-discrimination laws.[47] Expressive association does not allow a group to assert that its expression has been curtailed simply because it is forced to accept an unwanted member.[48] In the instant case, however, Respondent's mere presence would have obliged Petitioners to communicate a message of homosexual tolerance that they plainly did not accept.[49] The bare fact that Respondent had publicly avowed both his homosexuality and gay rights activism combined with his wearing a scoutmaster's uniform created a symbolic message that would significantly affect Petitioners' own implicit anti-homosexual message.[50] The instant Court, thus, held that to force Petitioners to accept Respondent would contravene the First Amendment.[51]

The instant Court's holding substantially altered the balance between state anti-discrimination laws and the freedom of expressive association.[52]

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and morally straight.

Dale v. Boy Scouts of Am., 734 A.2d 1196, 1202 (N.J. 1999), *rev'd*, 120 S. Ct. 2446 (2000) (quoting BOY SCOUT HANDBOOK (10th ed. 1990)). The pertinent portion of the Scout Law reads: "A Scout is CLEAN. A Scout keeps his body and mind fit and clean. He goes around with those who believe in living by these same ideals. He helps keep his home and community clean." *Id.* (quoting BOY SCOUT HANDBOOK (10th ed. 1990)).

45. *Dale*, 120 S. Ct. at 2453. The instant Court nevertheless went on to examine evidence of Petitioners' point of view on homosexuality at some length as instructive on the sincerity of their view. *Id.*

46. *Id.* With the exception of one internal memo, there was little evidence on the record that Petitioners expressed any view on homosexuality other than silence. *See id.* at 2470 (Stevens, J., dissenting). The policy statements Petitioners had publicly released were all produced after Respondent's membership had been revoked and thus smacked of a litigation posture rather than genuine policy. *See id.* at 2464 (Stevens, J., dissenting).

47. *Id.* at 2453-54.

48. *Id.*

49. *Id.* at 2454.

50. *See id.* at 2455. The Court found that Respondent's presence in a scoutmaster's uniform would differ significantly from that of a heterosexual's in the same uniform in terms of the message that each would convey. *See id.*

51. *Id.* at 2457.

52. *See id.* at 2467 (Steven, J., dissenting). The Court had previously consistently held in favor of state anti-discrimination laws over claims of First Amendment freedom of expressive association. *Id.* (Stevens, J., dissenting). *See generally* New York State Club Ass'n v. City of New York, 487 U.S. 1, 13 (1988) (holding that the New York Human Rights Law does not in any significant way affect the associational interests of the State Club Association); Bd. of Dirs. of

The line of cases opening with *Roberts* had well established a rule for dealing with conflict between the two.[53] Deferring to anti-discrimination laws, this rule recognized the importance of equal access to public goods over a group's absolute right to select its members.[54] The instant Court's ruling tipped the scale in the other direction, reasserting the primacy of a group's autonomy in the selection of its members.[55] The benefits of this shift in balance are debatable.

The instant Court, for example, distinguished *Roberts*.[56] It failed, however, to give substantial criteria for its distinction.[57] This failure to provide guidance may limit the further extension of protection to other groups under anti-discrimination laws.[58] State legislatures may now be

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Rotary Int'l v. Rotary Club, 481 U.S. 537, 548-49 (1987) (holding that, while impeding the exercise of choice of associates may violate the right of expressive association, the application of the Unruh Act did not violate Rotary Clubs' right of expressive association); Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984) (holding that the application of the Minnesota Human Rights Act did not unnecessarily abridge the Jaycees' right of expressive association). *But cf.* Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 515 U.S. 557, 559 (1995) (holding that requiring parade organizers, who claimed the right of expressive association, to admit an unwanted group by force of the state anti-discrimination law would violate the First Amendment).

53. 468 U.S. at 623. In *Roberts*, the Court stated the rule that the freedom of expressive association may be limited by a law backed by a compelling state interest unrelated to the suppression of expression. *Id.*; *see also New York State Club Ass'n*, 487 U.S. at 13 (explaining that expressive association does not constitutionally protect every instance of selective inclusion or exclusion); *Rotary Club*, 481 U.S. at 549 (explaining that some infringement on the right of expressive association is justifiable).

54. *Roberts*, 468 U.S. at 623. The Court in *Roberts* concluded that assuring equal access to public goods and services was a state interest of the highest order. *Id.*; *see also Dale*, 120 S. Ct. at 2459 (Stevens, J., dissenting) (articulating the importance of placing principle over prejudice in ensuring the access to public goods).

55. *See Dale*, 120 S. Ct. at 2457. The Court found that Petitioners' interest in expressive association outweighed New Jersey's interest in eliminating discrimination. *Id.*

56. *See id.* at 2456.

57. *See id.* As a reason for the distinction, the instant Court offered nothing other than the bald assertion that in both *Roberts* and *Rotary Club* the Court found the law did not materially interfere with the expressive association. *See id.* It did not go on to explain why the Court had so found. *See id.* The only obvious difference is the fact that the prior cases dealt with gender while the instant case dealt with sexual orientation.

58. State anti-discrimination laws operate as extensions of the basic common law rule prohibiting innkeepers, smiths, and other professionals engaged in public employment from refusing to serve a customer without good reason. *See* Romer v. Evans, 517 U.S. 620, 627 (1996); *supra* text accompanying note 16. Unlike the common law, state laws explicitly list both those who may not make such discriminations and the groups who are specifically protected. *Romer*, 517 U.S. at 628. This has made it possible for states to protect specific groups that have not yet been given heightened equal protection scrutiny in the federal courts. *See id.* at 628-29. Since the inception of such laws, states have continued to expand their scope to include such suspect classes as sex, illegitimacy, and sexual orientation. *See id.* at 629. There is no reason to think that such expansion would not have continued.

more wary about extending protection to new categories of persons under their anti-discrimination laws.

The instant Court's ruling may also undermine existing protections. The instant Court denied that the doctrine of expressive association is a shield against anti-discrimination laws.[59] Yet the Court failed to provide substantial reasoning for its assertion.[60] Instead, by adopting the holding in *Hurley*, it transformed expressive association into just such a shield.[61]

The instant facts forced the Supreme Court to make some rather attenuated analogies in order to fit those facts into the unique circumstances of *Hurley*.[62] The instant Court, for example, found *Hurley* applicable based on two major determinations. First, it found that, irrespective of his intentions, Respondent is a symbol bearing a constant and discrete message.[63] Second, it also found that Petitioners, despite their silence on the issue, are engaged in expressive association with reference to homosexuality.[64] From these determinations, the instant Court concluded that the two "messages" are in contradiction.[65] Forcing Respondent's entry into Petitioners' organization would, therefore, be like forcing parade organizers to accept an unwanted group into their parade for the specific purpose of expressing a message at odds with that of the parade's.[66]

The result of the instant Court's reasoning is thus to extend to expressive association the full level of constitutional protection granted to pure speech.[67] Contrary to the instant Court's denial, therefore, the instant case did lend heightened protection to expressive association.[68] The instant case thereby turned expressive association into a safe harbor against state anti-discrimination laws.[69]

One potential problem with this extension is that almost any case of invidious discrimination can, on the instant Court's reasoning, be made to look like a matter of freedom of speech.[70] By treating individuals as

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59. *Dale*, 120 S. Ct. at 2453-54.

60. *See id.* at 2454.

61. *See id.* at 2476 (Stevens, J., dissenting).

62. *See* Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 515 U.S. 557, 560-61 (1995). The facts in *Hurley* were singular. The Court found that the organizer's symbolic speech, in the form of the parade, had been turned into a public accommodation by the application of the state law. *Id.* at 573. No such argument was ever tendered by the instant Court about Petitioners.

63. *See Dale*, 120 S. Ct. at 2455.

64. *See id.* at 2453.

65. *See id.* at 2454.

66. *See id.* at 2457.

67. *See id.*

68. *See id.* at 2476 (Stevens, J., dissenting) (explaining that the standards governing a free speech claim such as the one found in *Hurley* are distinct from and higher than those that apply to an expressive association claim).

69. *See id.*

70. *See id.* Criticizing the majority's reasoning in its application of *Hurley*, Justice Stevens

symbols and groups as expressive associations each bearing a distinct message, it is possible to turn acts of invidious discrimination into exercises of constitutionally-protected rights.[71] The instant Court's ruling thereby invites groups to discriminate without expressing any reason whatsoever for their discrimination.[72]

The negative impact of the instant Court's reasoning also needs to be viewed in light of the history of state anti-discrimination laws.[73] These laws were specifically used as stop-gap measures for dealing with invidious discrimination in areas the federal government could not address.[74] Disabling these laws, as the instant case does, creates a protected zone between the common law and federal law where groups such as the Petitioners' may openly practice invidious discrimination.[75]

One alternative basis for the instant Court's decision that would have avoided this problem would have focused on the nature of the group claiming the right of expressive association. Instead of straining to make the instant facts look like those of *Hurley*, the instant Court could have refined the criteria for distinguishing Petitioners' organization from groups such as the Jaycees.[76] One obvious criterion is a group's relationship to commerce.[77] The instant Court could have held that the stronger a group's

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pointed out that "the right of free speech effectively becomes a limitless right to exclude for every organization, whether or not it engages in any expressive activities." *Id.*

71. *See id.*

72. *See id.* at 2453.

73. *See generally* Romer v. Evans, 517 U.S. 620, 627-28 (1996) (describing the history of state anti-discrimination laws); *supra* text accompanying note 16.

74. *Romer*, 517 U.S. at 628-29; *see supra* text accompanying note 16.

75. *See* Boy Scouts of Am. v. Dale, 120 S. Ct. 2446, 2476 (Stevens, J., dissenting).

76. In *New York State Club Ass'n*, for example, the Court found that providing regular meal service and receiving regular payments from nonmembers for the furtherance of trade or business were significant characteristics in determining the nonprivate nature of an association. New York State Club Ass'n v. City of New York, 487 U.S. 1, 12 (1988). The Court made this determination while considering the intimate aspect of the freedom of association. *Id.*

77. Throughout the expressive association cases, the Court has regularly stated the importance of the fact that the groups falling under the rubric of a public accommodation frequently provide commercial or economic benefits. *See* Roberts v. United States Jaycees, 468 U.S. 609, 626 (1984) (finding that assuring women equal access to the leadership skills, business contacts and employment promotions provided by the Jaycees clearly furthers compelling state interests); Bd. of Dirs. of Rotary Club Int'l v. Rotary Club, 481 U.S. 537, 549 (1987) (finding that the Unruh Act plainly serves the interest in assuring equal access to women for the acquisition of leadership skill and business contacts). In the concurring opinion to *Roberts*, Justice O'Connor explicitly identified equitable access to commercial opportunities as a "profoundly important goal," noting that "an organization engaged in commercial activity enjoys only minimal constitutional protection of its recruitment, training, and solicitation activities." 468 U.S. at 632, 635. Other courts have explicitly excluded the Boy Scouts from the category of groups covered under anti-discrimination laws. *See generally* Welsh v. Boy Scouts of Am., 993 F.2d 1267, 1278 (7th Cir. 1993) (holding that Title II of the Civil Rights Act of 1964 is inapplicable to the Boy Scouts because it does not fall within the

relationship to commerce, the less expectation it should have of an inviolable freedom of expressive association. Doing so not only would have been true to the spirit of the state anti-discrimination laws,[78] it also would have adequately protected Petitioners, sufficiently distinguished *Roberts,* and substantially provided guidance for lower courts.

It is no small irony that a constitutional doctrine developed in a case whose ruling protected the NAACP from undue state interference should now be used to disable state civil rights law.[79] Yet, undeniably, the instant Court's ruling is the result of a general shift in focus from the civil rights of categories of persons to the constitutional rights of individuals and groups.[80] In so far as this is true, the instant case serves only to further pit these two interests against one another. The instant Court, thus, missed a golden opportunity to preserve the protections of state anti-discrimination laws and to promote their extension to other categories of persons while, simultaneously, protecting the associational interests of Petitioners. Instead, the instant Court created the potential for abuse by setting a precedent that pitches these two interests against each other on the battle ground of freedom of speech, where state anti-discrimination laws are almost always sure to lose.

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statute's definition of a place of public accommodation); Curran v. Mount Diablo Council of the Boy Scouts of Am., 952 P.2d 218, 239 (Cal. 1998) (holding that the Boy Scouts are not a business establishment as defined in the Unruh Act); Schwenk v. Boy Scouts of Am., 551 P.2d 465, 468-69 (Or. 1976) (holding that the Boy Scouts do not fall under the Oregon Public Accommodation Law, the primary purpose of which is to prohibit discrimination by businesses that provide public goods).

78. *See Roberts,* 468 U.S. at 615. A major focus of many state anti-discrimination laws is, in fact, providing equal access to business goods and services. *See id.*; *supra* text accompanying note 77. The New Jersey statute in question in the instant case, for example, defined a place of public accommodation as, among other things, "any producer, manufacturer, wholesaler, distributor, retail shop, store, establishment, or concession dealing with goods or services of any kind." N.J. STAT. ANN. § 10:5-5 (West 1999).

79. *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 461-62 (1958).

80. *See generally* William Murchison, *Preserving Our Liberties with Less Government,* WASH. TIMES, July 30, 2000, at B8 (describing the instant Court's decision as providing some small hope that Americans will be able to keep the government from running their lives).